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June 8, 2006

David O. Carson, Esq.
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P.O. Box 70400
Southwest Station
Washington, DC 20024

Dear Mr. Carson:

I appreciate this opportunity to respond to your letter of May 18 on behalf of the Joint Reply Commenters. I am authorized to state that this response is also endorsed by TimeWarner Inc., which also testified at the hearing on April 3.

Your letter asks:

"If an exemption could be fashioned that were applicable only to college and university film studies professors who circumvent access controls on DVDs solely for the purpose of copying short film clips from motion pictures for purposes of classroom display, would you have an objection to such an exemption?"

Our answer is yes, we would object to such an exemption. This is so for two main reasons.[1]

First, and most importantly, the case simply has not been made that § 1201(a)(1)(A) is having an adverse impact on the ability of the group of users specified in your letter to make the specific kinds of non-infringing uses described therein. The record in this proceeding, including the testimony taken on April 3, clearly shows that this law is not preventing college film studies professors from making compilations of short film clips for performance in their classrooms for instructional purposes. The evidence demonstrates at least four ways that they can do this:

[1] For the purposes of this letter, we will use the following abbreviations for official materials: 2005 NOI – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 70 Fed. Reg. 57,526 (Oct. 3, 2005); 2003 Recommendation – The Recommendation of the Register of Copyrights in RM 2002-4, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003), which is available at http://www.copyright.gov/1201/docs/registers-recommendation.pdf; 2000 Recommendation – Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556 (Oct. 27, 2000). In referring to the hearing materials, we will use the following abbreviation: Tr.-Transcript of the April 3, 2006 hearing, as posted at http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf.

- They can seek permission from the copyright owner for this use. The hearing featured testimony from a major motion picture studio, the proprietor of the largest library of English language feature film material in the world, which receives, and which routinely and efficiently grants, requests for showing clips in an educational setting. No requests to circumvent access controls in order to make clip compilations for educational purposes have ever been received. Tr. at 42-3. None of the witnesses at the April 3 hearing had made such a request, and one testified that the option of doing so had never occurred to him until the reply comment round of this proceeding. Tr. at 158-9. Of course such licensed uses would be non-infringing uses.

- They can use devices that are readily available in the marketplace to bookmark scenes from the discs they wish to display. The Pioneer system demonstrated by Ms. Benedetto at the hearing is one such device, but there are others on the market, and presumably there will be more and better such devices if there is a market demand for them.[2]

- They can use formats other than DVD, notably VHS. The record clearly demonstrates that this option is available for virtually every title in the University of Pennsylvania film department library, as well as for nearly every title on the Library of Congress film register that is available in DVD format. Tr. at 34.

- Finally, they can employ the screenshot method demonstrated at the hearing by Mr. Attaway for making a digital clip of any motion picture that can be displayed on a television or computer screen. This is essentially the digital version of the same technique that the Register specifically acknowledged in her 2003 Recommendation at 116.

We appreciate that the proponents of an exemption in this area argue that, by comparison to what could be achieved through circumvention of access controls on commercially distributed DVDs, each of these methods of enabling classroom uses of audio-visual materials is inferior in some way: it takes longer, it is less convenient, or it produces a lower quality visual image, etc. Each of these assertions is debatable[3]; but even accepting them at face value, they simply do not add up to a showing that fulfills the requirements for a successful proponent of an exemption in this proceeding. The hearing record and the previously submitted comments make abundantly clear that film studies faculty are able to make the desired uses without circumventing access controls. To the extent that licensed use, or a use that does not involve making copies (e.g., use of a bookmarking device), are unavailable to them for some reason, the copying which they seek to make is non-infringing to the extent that it qualifies as fair use under Section 107 of the Copyright Act. And there is "no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in identical format of the original." 2003 Recommendation at 117, quoting Universal City Studios v. Corley, 273 F.3d 429, 458 (2d Cir. 2001).

Since the proponents can readily, easily, cheaply and effectively make fair use of clips from the works in question without circumventing access controls, they have simply failed to demonstrate the

[2] At the hearing, Mr. Herman testified in detail about the size of the potential market, which he estimated at 20,000 units at the post-secondary level. Tr. at 23. In fact, these devices also appear to be used at the high school level and to be available through educational dealers. Tr. at 48, 63-4.

[3] For instance, many film studies departments will have ready access to higher quality recording equipment, and more skilled and experienced audio-visual technicians, than Mr. Attaway's staff used in making the screenshot demonstration displayed at the hearing; it can be expected that the results would be of commensurately higher quality as well. This could address some of Prof. Decherney's critiques of the quality of the image presented at the hearing. Tr. at 66-7.

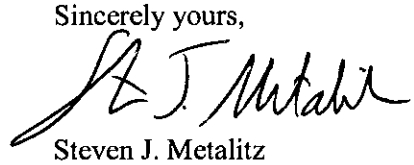
requisite adverse impact of § 1201(a)(1)(A) on their ability to make non-infringing uses. On this record, the proposed exemption described in your letter could not be justified.[4]

Second, even if the record were different, we question whether the statute under which this proceeding is held would permit such an exemption to be recognized. As the Notice of Inquiry for this proceeding states, "[t]he Register found that the statutory language required that the Librarian identify 'classes of works' based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works." 2005 NOI at 57, 529 (emphasis added). This conclusion was based upon a "review of the statutory language, the legislative history, and the extensive record in the proceeding" held in 2000, in which the views of all interested parties were elicited on precisely this question. Id. The basis for the Register's conclusion is spelled out in detail in her 2000 Recommendation at 64,559-61.

Of course, the Register is free to revisit this issue in this proceeding, and, if there is a persuasive basis for doing so, to modify her conclusion about whether the statute allows a "particular class of works" to be defined in terms of specific users and uses. If such a re-examination were to be undertaken, we would welcome the opportunity to provide our views on what the statute does or does not permit in this area. But unless and until the Register determines that her reading of the statute and legislative history six years ago was wrong and should be changed, and explains the basis for her determination, we believe that the existing ground rules should be followed, under which the type of exemption described in your question should not be recognized because it does not pertain to a "particular class of works."

Please let me know if you have any further questions or I can provide other information that will assist the Copyright Office.

Sincerely yours,



Steven J. Metalitz

cc: Peter Decherney
Sandra Benedetto
Bruce H. Turnbull, Esq.
Jonathan Band, Esq.
Fritz Attaway, Esq.
Bill D. Herman
Sandra M. Aistars, Esq.

[4] Furthermore, evidence was presented at the hearing about the likelihood that, in the near future, the access controls used with commercially distributed audiovisual works may more readily accommodate the direct copying of clips from next generation DVDs. Surely the considerable effort and investment that will be needed to develop and deploy these more flexible access control measures is much less likely to be expended if instead the Copyright Office were to intervene in the market by recognizing an exemption such as the one discussed in the May 18 letter.